No. 11704

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

PRIEST RAPIDS IRRIGATION DISTRICT, A PUBLIC CORPORATION, APPELLEE

PRIEST RAPIDS IRRIGATION DISTRICT, A PUBLIC CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Upon Appeal from the District Court of the United States for the Eastern District of Washington

BRIEF FOR THE PRIEST RAPIDS IRRIGATION DISTRICT, APPELLEE AND CROSS APPELLANT

MOULTON & POWELL,
Kennewick, Washington

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Spokane, Washington

Attorneys for the Priest Rapids Irrigation District, Appellee and Cross Appellant

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A memorandum opinion of Judge Schwellenbach appears at R. 175-181. An oral opinion of Judge Driver appears at R. 279-290; and another oral opinion of Judge Driver appears at R. 1133-1136. None of these opinions has been reported. For the convenience of this Court they are printed in the appendix of this brief, pp. 73-95, *infra*.

JURISDICTION

The Government's petition for condemnation (R. 2) and its amended petition, No. 128-99 (R. 107), invoked the jurisdiction of the district court under the Act of August 18, 1890, 26 Stat. 316, as amended by the Acts of July 2, 1917, 40 Stat. 241, April 11, 1918, 40 Stat. 518, 50 U. S. C. sec. 171, and section 201 of the Act of March 27, 1942, 56 Stat. 176, 177, 50 U. S. C. sec. 171 (a).

The cross appeal of the Priest Rapids Irrigation District is from the district court's judgment entered on March 7, 1947 (R. 1147-1158) and amended on March 14, 1947 (R. 1161-1163). Notice of the District's cross appeal was filed on June 6, 1947 (R. 1165-1166). This Court's jurisdiction of the District's cross appeal is invoked under section 128 of the Judicial Code as amended, 28 U. S. C. sec. 225 (a).

STATEMENT OF THE CASE

This is the one brief of the Priest Rapids Irrigation District, cross appellant and appellee, the appeal and cross appeal having been consolidated for briefing purposes by stipulation filed in this Court.

This statement of the case presents the questions involved in both the cross appeal and the appeal and the manner in which they are raised. — As will appear, the questions involved in the appeal and cross appeal arise from the same, or related, rulings of the district court. — The Government's "statement" (App. Br. 2-10) is controverted as being incomplete, even as regards the Government's appeal.

The questions involved arose in the gigantic condemnation action, *United States of America vs. Clements P. Alberts,* Civil No. 128 in the district court (R. 2), a condemnation proceeding for acquisition of approximately 194,000 acres (R. 8) for the Hanford Engineering Project. The part of that proceeding now on appeal was entitled, in the district court, *United States of America vs. Clements P. Alberts, Priest Rapids Irrigation District, et al.,* No. 128-99 (R. 106). The questions involved in the appeal and cross appeal arose at various times in *United States v. Alberts,* No. 128, and finally were tried in *United States v. Alberts, Priest Rapids Irrigation District, et al.,* No. 128-99.

The district court ruled that the Government must pay compensation for the District's so-called non-irrigation properties; but ruled that the Government need not pay compensation for the so-called irrigation properties of the District, other than the sum that was deposited in court and used to pay off the District's outstanding bonds which were a lien on said properties (R. 1147-1158). The Government appeals from the first of said rulings, the Government contending that it need not pay any compensation for the entire properties of the District, other than the deposit used to pay off said bonds. The District cross appeals from the second of said rulings, the District contending that the Government should be required to pay compensation in the amount of the value of all of the properties of the District taken by the Government.

In answer to a special interrogatory put to the jury by the district court, the jury determined that the value of the District's irrigation properties taken by the Government was $365,845 (R. 1132). The Government's deposit in court of $170,500 was used by the clerk of the court to pay off the bonds which were a lien on said properties (R. 1148-1149). And the District contends, on its cross appeal, that the award to the District should have been greater by the difference in those two amounts, namely, $195,345. The District therefore contends that the district court should have entered a deficiency judgment for defendant District in an amount equal to

the sum of $473,356 (the amount of the jury's verdict) plus $195,345, or a total of $668,701, together with interest as specified in the District's proposed judgment (R. 1138, at 1146).

Statement of the manner in which the questions involved on the appeal and cross appeal arose requires reference to various proceedings in the condemnation action of *United States of America v. Alberts, et al.,* No. 128 in the trial court.

The condemnation action was commenced on February 23, 1943 by the filing of the petition for condemnation (R. 2-10), pursuant to the request of the Secretary of War, dated February 18, 1943 (R. 8). As alleged in paragraph I of the petition (R. 2), the condemnation was undertaken:

> pursuant to and in accordance with the provisions contained in the Act of Congress approved August 18, 1890 (26 Stat. 316) as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 58; 50 U. S. S. sec. 171), and March 27, 1942 (Public Law 507-77th Congress), * * *.

On the same date, February 23, 1943, upon the Government's motion pursuant to the "Second War Powers Act, 1942", the court signed an order granting the Government the right of immediate possession (R. 10-16). The property being condemned was described in the petition and order (R. 3, 13) as follows:

> The fee simple title, subject, however, to existing easements for public roads and highways, for public utilities, for railroads, and for pipe lines, in and to the following described lands, to-wit:

Then followed perimeter description of the areas being condemned. On April 22, 1943, an amended petition (R. 16-24) and an amended order granting right of immediate possession (R. 27-32) covered additional property, increasing the areas taken from about 194,000 to about 206,000 acres. In both of the above mentioned petitions, the Government prayed (R. 6, 22):

> 2. That a jury be empaneled to fix and determine a just and proper award and compensation for the property herein described, or in case a jury be waived, then that the compensation to be paid as aforesaid be ascertained and determined by the court or a judge thereof, and that the parties entitled to receive such compensation be determined thereby.

Pursuant to the order granting it the right of immediate possession, the Government took actual possession of the irrigation distribution system of the District on April 1, 1943 and took actual possession of the power plant on October 1, 1943; and it was so stipulated at the trial in this proceeding which is on appeal (R. 307).

Subsequent to the February 23, 1943 and April 22, 1943 petitions and orders granting right of immediate possession, the Government from time to time (R. 177) filed amended petitions and ac-

companying declarations of taking, covering certain designated tracts within the District. All of the District's properties and all of the lands within the District were within the large areas covered by the original petitions and orders of February 23, 1943 and April 22, 1943. An example of those amended petitions is the one filed on August 26, 1943 and designated No. 128-43 (R. 70-80). Therein the Government added to the recital of authorities:

> and the Act of Congress approved February 26, 1931 (40 U. S. C. 258a) and acts supplementary thereto and amendatory thereof. (R. 71; Cf. R. 2)

The tracts covered by No. 128-43 were described in paragraph IV of the amended petition as follows (R. 72):

> The full fee simple title thereto, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, and for existing irrigation ditches, canals, and laterals owned by the Priest Rapids Irrigation District in and to the following described lands, to-wit:

Among the tracts covered by No. 128-43 was tract No. P-1336, of which C. I. Wright and wife were owners (R. 74, 78). In the prayer of said amended petition No. 128-43, determination of compensation to be paid was sought, as in the original petitions (R. 80).

The first trial to determine compensation for tracts of land within the Priest Rapids Irrigation

District was had in the early part of October 1943, and the tracts involved included the Wright tract. And on October 12, 1943 an offer of proof was made on behalf of the owners of the Wright tract and two other tracts (R. 84-92). Briefly, the offer was an offer of proof of the value of the properties of the Priest Rapids Irrigation District of which the individual landowners were members by virtue of their ownership of tracts within the District. The offer of proof was objected to by the Government (R. 96):

> for the reason that the value of the assets of the District and the lands are fully reflected in the appraisal of those lands as irrigated tracts.
>
> For the further reason that there is no property interest in the assets of the District as to the lands or the owners of the lands until such time as the District has been dissolved under the provisions of the laws of the State of Washington, and that at the time of the taking there was no dissolution of the District and for the further reason that at the time of the taking any equitable right of the lands or the owners in the facilities of the District passed with the title itself and that the Government in taking the full fee simple title to the property acquired any equitable interest which either the lands taken or the owners of the lands taken as of that date may have had.

Judge Schwellenbach sustained the objection and made an oral statement for the record regarding his ruling (R. 97-99).

The Government, at the time of that first trial in October 1943, stated and agreed that the Government would proceed expeditiously with the filing of a declaration of taking covering the Priest Rapids Irrigation District's property (R. 100-105, at 103). But more than six months passed without such a declaration of taking being filed. As a consequence, on April 26, 1944, certain proceedings were had in the court's chambers (R. 100-105). Judge Schwellenbach noted (R. 102-103) that the Government in May 1943, had asserted that "it intended to acquire all of the property within the District, as a result of which it would then become the owner of the facilities and instrumentalities of the District." He noted further (R. 103-104) the Government's agreement in October 1943, to proceed expeditiously with the filing of a declaration of taking on the District's property. Then, notwithstanding the desire of the War Department and Department of Justice "to acquire title to all the property within the District before filing declarations of taking, as to the assets of the District" (R. 105) the court gave notice to the Government as follows (R. 104):

> I am now giving notice to the Government that before any other cases are tried either the declaration of taking must be filed, or the next time any trials ensue I intend to permit the property owners to prove the value of their proportionate share in the Irrigation District, and it will be necessary for the Government by early June, which will be the date of the

> next trial, to be ready to present its testimony as to the value of the Irrigation District, and I intend from now on to permit the property owners to submit such testimony and submit that issue to the jury.

In response to that notice the Secretary of War wrote to the Attorney General on May 4, 1944, requesting that the Attorney General have filed the enclosed declaration of taking No. 128-99. As stated by the Secretary of War in said letter (R. 81):

> The declaration of taking covers all the operating properties and facilities of the Priest Rapids Irrigation District as described more fully therein, and shows $170,500.00 as the estimate (*sic*) compensation therefor. This compensation represents the outstanding indebtedness of the District.

The Secretary of War noted (R. 82) that the War Department had been recently advised that unless a declaration of taking covering the District's properties and facilities was filed before June 1, 1944:

> the court will entertain a motion to set aside all verdicts returned during this term of court and will permit in the future, the defendant in all cases to show the value of the District's properties and facilities. It is the recommendation of this Department that the declaration of Taking inclosed herewith, be filed immediately.

The Secretary of War explained in said letter of May 4, 1944 to the Attorney General that no appraisal report was being furnished on the District's

properties covered by declaration of taking No. 128-99 (R. 82-83):

> An appraisal report is not furnished on any of the lands and interests described in the declaration of taking *for the reason that under the acquisition policy established by this Department and approved by the Department of Justice, it is the position of the Government that upon the acquiring all of the land in the Priest Rapids Irrigation District, the Government becomes the owner of the Irrigation District subject only to the bonded indebtedness of the District itself and an appraisal is therefore unnecessary.* (Italics added)

In accordance with the "acquisition policy" established by the War Department and approved by the Department of Justice, the amended petition in No. 128-99 (R. 106-119) contained as paragraph VI (R. 117-118) the following:

> That the real property and interests therein described in paragraph IV hereof constitute all of the operating properties and facilities owned of record or claimed by the Priest Rapids Irrigation District, a municipal corporation of the State of Washington. That petitioner, United States of America, by reason of its ownership of all the real property lying within the boundaries of said Priest Rapids Irrigation District is in truth and in fact the equitable owner of the real property and interests therein described in paragraph IV hereof, subject only to the lien of the bonded indebtedness of said Priest Rapids Irrigation District, and said Priest Rapids Irrigation District, a municipal corporation of the State of Washington, now holds legal title thereto in trust for the use and benefit of petitioner,

> United States of America. That the sum of $170,500.00 deposited in the registry of this court with the filing of declaration of taking, No. 99 herein represents a sum which together with the bond redemption fund of said Priest Rapids Irrigation District is sufficient to pay and discharge all bonded indebtedness of said Priest Rapids Irrigation District.

Likewise in accordance with said "acquisition policy", the prayer in the amended petition (R. 118) omitted any request that just compensation be determined. The amended petition No. 128-99 and the accompanying declaration of taking were filed on May 12, 1944 (R. 119, 130).

Judge Schwellenbach entered his order on declaration of taking (R. 131-140) on May 15, 1944. Said order recites that the original petitions for condemnation filed on February 23, 1943 and April 22, 1943, and the orders granting the right of immediate possession entered on the same dates, covered the premises of the Priest Rapids Irrigation District described in the declaration of taking (R. 131); and the order on the declaration of taking further recites that it appeared to the court (R. 132-133):

> *that pursuant to said orders granting the right of immediate possession entered herein on February 23, 1943 and April 22, 1943, possession was taken by the petitioner of the following described property* * * *, (Italics added)

In said order on declaration of taking Judge Schwellenbach (R. 140):

> *Ordered that possession of the above described property be and the same is hereby confirmed,* * * *. (Italics added)

In August and September of 1944 (R. 142-160), the Court entered judgments ordering that the bonds of the District be paid by the clerk of the court from the $170,500 deposit. The judgments, entered pursuant to stipulations, state that the District joined in the stipulations solely for the purpose of agreeing to payment of the bonds and to the correctness of the amounts due thereon, without prejudice to any rights the District might otherwise have to contest the amount of just compensation to be paid for the taking of the properties of the District (e. g., R. 159).

The District on February 12, 1945 filed an answer to the amended petition No. 128-99, taking issue with the "acquisition policy" as set forth in paragraph VI of the amended petition, and affirmatively alleging the value of the District's properties (R. 161-172). The Government filed a demurrer to the answer (R. 173), and after a hearing on that demurer [and on a demurer to the answer of the Richland Irrigation District in a similar proceeding, No. 128-100], Judge Schwellenbach filed his memorandum opinion on June 21, 1945 (R. 175-181). For the convenience of this Court, Judge Schwellenbach's memorandum opinion is printed as Appendix "A" to this brief, pages 73 to 79, *infra.* An order sustaining the Gov-

ernment's demurer, with leave to amend, was signed on June 25, 1945 (R. 181).

Shortly thereafter Judge Schwellenbach left the bench; and in the winter of 1946 he was succeeded by Judge Driver.

The District filed an amended answer on September 21, 1945 (R. 182-191); and the Government again filed a demurrer, on October 24, 1945 (R. 191). That demurrer was argued on May 31 and June 1, 1946, before Judge Driver; and at the conclusion of argument, Judge Driver rendered an oral opinion (R. 279-290), in which he overruled the demurrer but decided that he should adopt and apply the so-called Schwellenbach formula (R. 287). An order overruling the demurrer was entered (R. 292). For the convenience of this Court the reporter's transcript of Judge Driver's oral opinion is printed as Appendix "B" to this brief, pages 80 to 91, *infra.*

Collaterally, in the winter of 1946 the Priest Rapids Irrigation District and other plaintiffs instituted an action in the Superior Court in and for Benton County, Washington, against the County Auditor and the County Treasurer (R. 252-267). Alleging that the county officials, at the request of Government counsel, were refusing to honor District warrants against District funds in the hands of the County Treasurer (R. 256), the plaintiffs in that Benton County case sought to compel the county officials to honor said warrants. Also, the

plaintiffs sought determination of the status of the District's directors and prayed that the Superior Court retain jurisdiction of the cause, looking to further appropriate proceedings following final disposition of the condemnation case (R. 263-265).

The Government by a special appearance in the Benton County action moved to quash and dismiss it (R. 273); and its motion was overruled (R. 277). Thereafter, on May 6, 1946, the Government, by its motion in No. 128-99 for appointment of trustee or receiver and for restraining order, sought to have the Federal district court enjoin further proceedings in the State court action (R. 221-267). The matter was set for hearing by an order to show cause (R. 268). Return to the rule was made (R. 270-279) and the matter was heard on May 15, 1946. On June 1, 1946, Judge Driver, in his oral opinion, announced his ruling against the Government's motion (R. 279-290, at 280-283, 288- 289; Appendix "B", pp. 81-4, 89-90, *infra.*). An order denying the motion was entered (R. 293).

In the same oral opinion of Judge Driver, the district court concluded that a motion for leave to intervene in No. 128-99, filed by landowner Wright (R. 205-215), should be denied; and an order of denial was entered (R. 290). As Judge Driver stated, his reason for denying intervention by individual landowners was: "under my theory of it they are represented by the irrigation districts" (R. 289).

United States of America vs. Clements P. Alberts, Priest Rapids Irrigation District, et al., No. 128-99, came on for trial on February 10, 1947 (R. 296).

The Government objected to the introduction and reception of any and all testimony as to the value of the District's property (R. 387-390); and Judge Driver overruled the objection, consistently with his ruling of June 1, 1946 on the Government's demurrer and with his ruling announced in chambers at the beginning of the trial (R. 390; See also, R. 701-706, 1016-1028).

At the same time, the District made a record of its exception to that part of those rulings by Judge Driver which was against the District's position (R. 390-394).

During the trial, but in the absence of the jury, the District offered to prove that the Government had paid, in compensation awards, settlements, and deposits in court only $630,960.80 for all of the lands within the Priest Rapids Irrigation District (R. 729-745, at 741-743). The offer of proof, made in the absence of the jury, was not made as an offer of evidence bearing on the value of the District's properties, but was made as an offer of evidence relevant and material to the legal issue of whether the District is entitled to compensation for all of its properties (R. 745). The offer of proof that the Government had paid only $630,960.80 for

all of the lands within the District, including all of the improvements on the land as well as any crops growing thereon, was made (R. 729) to refute the Government's contention that the compensation paid for those lands within the District reflected the value of the properties of the District itself. [Subsequently, the jury, by its verdict and its answer to the special interrogatory, determined that the total value of the properties of the District itself was $839,201 (R. 1131-1132).] The Government's objection (R. 743-744) to the offer of proof was sustained and the offer rejected (R. 745).

Judge Driver overruled the Government's motion for a directed verdict for a nominal sum (R. 852).

In his charge to the jury (R. 1098-1108), Judge Driver adhered to his application of the so-called Schwellenbach formula, in accordance with his rulings of June 1, 1946 and February 11, 1947.

The District excepted (R. 1111-1114, 1116) to the court's refusal to give the District's requested instructions No. 9 and No. 10 (R. 1129-1130) and to the court's charging the jury to value the District's properties separately and to return a verdict for only the non-irrigation properties (R. 1105, 1106). The Government excepted (R. 1116-1117) to the court's refusal to give the Government's requested instructions No. I and No. II (R. 1130-1131). These exceptions were in line with the legal positions

taken by the District and the Government throughout the proceeding.

The jury unanimously returned the following verdict, and answer to the court's Special Interrogatory (R. 1122-1123, 1131-1132).

VERDICT

> We, the jury in the above entitled cause, find that the just compensation to be paid for the taking of that portion of the properties of the defendant, Priest Rapids Irrigation District, not devoted and applied to irrigation purposes, is $473,356.00. P. E. Nickerson, Foreman.

SPECIAL INTERROGATORY

> What was the fair, cash, market value at the time of taking of that part and portion of the properties of the defendant, Priest Rapids Irrigation District, taken by the United States, devoted and applied to irrigation purposes? Answer: $365,845.00. P. E. Nickerson, Foreman.

On March 7, 1947, Judge Driver refused to enter judgment in the form proposed by the District (R. 1138-1147). After argument regarding the form of judgment, Judge Driver delivered his oral opinion (R. 1133-1137) and entered the court's judgment on verdict (R. 1147-1158). For the convenience of this Court the reporter's transcript of Judge Driver's oral opinion regarding judgment is printed as Appendix "C" to this brief, pages 92 to 95, *infra*. On March 14 Judge Driver (R. 1161-1163) struck from said judgment one paragraph and sub-

stituted therefor another paragraph, which provided that the deficiency judgment in the amount of $473,356, with interest at the rate of six per cent per annum from October 1, 1943, shall be paid into federal court and remain subject to the orders of that court:

> until such time as this Court shall order the payment of the same to the Superior Court of the State of Washington, in and for Benton County, for the use and benefit of the Priest Rapids Irrigation District in liquidation proceedings to be maintained in said Superior Court, * * *.

The Government filed notice of appeal (R. 1164) on June 6; and thereupon the District on the same date filed notice of cross appeal (R. 1165-1166).

The Government adopted its statement of points filed in the district court as its statement of points to be relied upon in this Court (R. 1169, 1181); and the District adopted its statement of points filed in the district court as its statement of points to be relied upon in this Court (R. 1174, 1182).

SPECIFICATION OF ERRORS

The district court erred:

1. In ruling that the value of the District's so-called irrigation properties would be determined by the jury only for limited purposes, excluding a deficiency award for said irrigation properties (R. 390-394).

2. In refusing to instruct the jury to return a verdict in the amount of the value of all of the property of the Destrict taken by the petitioner. — The refused instruction reads as follows (R. 1129):

INSTRUCTION No. 9

> You are instructed to determine the value of all of the property of the Priest Rapids Irrigation District described in the amended petition No. 128-99. That covers both the so-called irrigation properties and the so-called power properties. Although evidence bearing on the value of those two classes of district property has been segregated from time to time during the course of the trial, you are instructed to arrive at a verdict in a lump sum amount for all of the property.

The grounds of the objection to the court's refusal to give the above instruction read as follows (R. 1113-1114):

> 1. The Court's rulings deny to defendant district the constitutional protection of the fifth amendment to the Constitution of the United States of America: "nor shall private property be taken for public use, without just compensation";

2. The Acts of Congress under the authority of which the Government instituted this condemnation proceeding, and which Acts of Congress are recited in the original and amended petition in Civil No. 128 and in the amended petition and declaration of taking in Civil No. 128-99, require that there be determination of just compensation for the district's properties which in this condemnation proceeding the Government has taken in the exercise of its power of eminent domain;

3. That proceedings under the Declaration of Taking Act (40 U. S. C. 258a) and its provisions for deposits paid into the registry of the Court and for vesting of title in the Government are merely ancillary to the main condemnation proceeding, and cannot be used as a device for avoiding the basic constitutional and statutory requirement that in this condemnation proceeding there be a judicial determination and award of just compensation for the district's property—a use which the Government has attempted in Civil No. 128 and which the Court's rulings partially allow;

4. The pleadings and record in Civil No. 128 show that in the previous proceedings in No. 128 there has not been any determination or award of just compensation for the defendant district's properties;

5. The "acquisition policy" of the War Department and the Government's contention in support thereof, which the Court's rulings uphold in part, cannot properly be construed as more than a claim to part or all of the compensation award for the district's properties, which claim should be considered, if at all, after determination of the amount of the award and not as a device for evading determination and award of compensation; and

6. The "acquisition policy" of the War Department and the Government's contentions are based on the Government's construction of state statutes and decisions which are not applicable to the situation of the defendant district, or which at least have never been held applicable, and which this Court's rulings of June 1, 1946, and February 11, 1947, properly leave for State Court determination, as to the district's non-irrigation properties, but as to irrigation properties—erroneously decide in the Government's favor "on the basis of preliminary guesses regarding local law."

3. In instructing the jury to value the District's properties separately and to return a verdict in the sum of the value of only the so-called non-irrigation properties. — The court's instruction (R. 1105-1106) reads as follows:

> Under the circumstances and the law as contrued and applied by the court your verdict must be limited to a finding of just compensation for only that part of the defendant's properties involved in this action devoted to purposes other than irrigation purposes. * * *
>
> In short, members of the jury, you are to divide and allocate the cash, market value of defendant's properties in accordance with its irrigation and non-irrigation uses and purposes. The non-irrigation value which you find should be included in your general verdict. The irrigation value which you find should be included in your statement of value in answer to the special interrogatory. The sum of these two amounts, the amount of your general verdict and the amount of your answer to the special interroga-

> tory added together, should equal the fair, cash, market value of all of the properties of the defendant involved in this action.

The grounds of the objection to the court's above instruction read the same as the grounds of objection set out in specification of error No. 2 above, said grounds having been incorporated by reference, without objection, at the trial (R. 1113-1114, 1116).

4. In ordering that the petitioner, for the taking of the District's irrigation properties, the value of which the jury determined to be $365,845 as of April 1, 1943, shall pay no sum other than the $170,500 deposited as estimated just compensation for all the property of the District. — The court's order appears in the court's judgment (R. 1147-1158, at 1149-1150).

5. In refusing to enter a deficiency judgment for the District in the sum of $668,701. — A deficiency judgment for the District in the sum of $668,701, together with interest from appropriate dates, was proposed by the District, and refused by the court on March 7 (R. 1138-1147).

SUMMARY OF ARGUMENT

Argument on cross appeal:

Introduction—Just compensation, guaranteed by the Fifth Amendment has not been awarded for the District's irrigation properties.

I. The Fifth Amendment and the substantive and procedural law of federal condemnation actions require that the Government pay just compensation for ALL of the District's properties taken by the Government.

II. The Government, contrary to established law and the record, attempted use of the ancillary proceedings provided by the Declaration of Taking Act as separate and independent proceedings to carry the Government's "acquisition policy" into effect.

III. Prior to trial in No. 128-99, there was no determination or award of just compensation for any of the District's properties.

IV. No state statute or judicial decision can affect the District's substantive right to be paid just compensation for ALL of its properties. — Moreover, the Government's contention is based on misconstruction of state law.

ARGUMENT ON CROSS APPEAL

Introduction

Just Compensation, Guaranteed By the Fifth Amendment, Has Not Been Awarded for the District's Irrigation Properties.

The value of the District's irrigation properties when taken by the Government on April 1, 1943 (R. 307) was $365,845, as determined by the jury in answer to the special interrogatory (R. 1132). The Government's deposit in the registry of the court was only $170,500, which was paid by the clerk of the court in liquidation of the District's bonded indebtedness that was a lien upon the District's irrigation properties (R. 1149). But under

the so-called Schwellenbach formula, as adopted and applied by the district court, the judgment orders that no other sum shall be paid by the Government as just compensation for the taking of said irrigation properties (R. 1149-1150). Thus, the award for the District's irrigation properties, determined by the jury to have a value of $365,845, was limited by the court's judgment to the Government's deposit of $170,500.

The Government should be required to pay the difference of $195,345. — That sum of $195,345 should be awarded to the District for its irrigation properties, in addition to the $473,356 awarded to the District for its power properties (R. 1149-1150, 1157). The district court's judgment should be reversed with instructions to enter a deficiency judgment in the sum of $668,701 together with interest as specified in the District's proposed judgment (R. 1146).

There is no support in law for the Government's basic contention that it may take all of the District's properties without paying any compensation for them except the Government's deposit of $170,-500, used by the clerk of the court to liquidate the District's bonded indebtedness. Nor is there any support for the Schwellenbach formula to the extent it allows the Government to take $365,845 worth of irrigation properties and pay as "just compensation" only the $170,500 deposit. The Government's contention and that part of the Schwel-

lenbach formula are contrary to the Fifth Amendment of the Constitution of the United States, inconsistent with the acts of Congress pursuant to which condemnation of the District's properties was undertaken, and contrary to the controlling decisions of the federal courts.

I

The Fifth Amendment and the Substantive and Procedural Law of Federal Condemnation Actions Require That the Government Pay Just Compensation for ALL *of the District's Properties Taken By the Government.*

It is well established by decisions of the Supreme Court that the just compensation required by the Fifth Amendment is the full and perfect equivalent in money of property taken by the Government.

> *Monongahela Navigation Co. v. United States,* 148 U. S. 312, 326, 13 S. Ct. 622, 37 L. Ed. 463 (1893);
>
> *Olson v. United States,* 292 U. S. 246, 255, 54 S. Ct. 704, 78 L. Ed. 1236 (1934);
>
> *United States v. Miller,* 317 U. S. 369, 373, 63 S. Ct. 276, 87 L. Ed. 336 (1943).

A point made in the opinion in *Monongahela Navigation Co. v. United States, supra* (148 U. S. 312, 326) is particularly applicable here:

> And this just compensation, it will be noticed is for the property, and not to the owner. Every other clause in this 5th Amendment is personal. "No person shall be held to answer for a cap-

> ital, or otherwise infamous crime," etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the "just compensation" is to be a full equivalent of the property taken. * * * and leaves it, to stand as a declaration, that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner.

It is the *property* of the Priest Rapids Irrigation District that may not be taken without just compensation.

It was the *property* of the District that the Government took. — And the condemnation proceeding is in rem. *United States v. Petty Motor Co.,* 327 U. S. 372, 376, 66 S. Ct. 596, 90 L. Ed. 729; *Duckett & Co. v. United States,* 266 U. S. 149, 151, 45 S. Ct. 38, 69 L. Ed. 216; *United States v. Dunnington,* 146 U. S. 338, 350, 354, 13 S. Ct. 79, 36 L. Ed. 996; *Washington Water Power Co. v. United States,* 135 F. (2d) 541, 543 (CCA 9th); *United States v. 25.936 Acres of Land, Etc.,* 153 F. (2d) 277, 279 (CCA 3rd 1946).

Furthermore, it is well established that the condemnation award stands in the place of the property which has been taken.

> *United States v. Dunnington,* 146 U. S. 338, 351, 353, 13 S. Ct. 79, 36 L. Ed. 996 (1892);

Meadows v. United States, 144 F. (2d) 751, 753 (CCA 4th 1944);

United States v. 53¼ Acres of Land, 139 F. (2d) 244, 247 (CCA 2d 1943; cert. den. 322 U. S. 730.

As the court held in *United States v. 25.936 Acres of Land, Etc.,* 153 F. (2d) 277, 279 (CCA 3rd 1946):

> A condemnation proceeding is a proceeding in rem. It is not a taking of rights of persons in the ordinary sense but an appropriation of the land or property itself. As indicated by the Supreme Court in Duckett & Co. v. United States, 266 U. S. 149, 151, 45 S. Ct. 38, 69 L. Ed. 216, all previous existing estates or interests in the land are obliterated. An unqualified appropriation in fee simple by the United States under the Act, cited supra, creates a new title. *The condemnation award when made stands in the place of the land and the rights of all persons may be treated as though transferred to the award.* United States v. Dunnington, 146 U. S. 338, 351, 13 S. Ct. 79, 36 L. Ed. 996; United States v. Certain Lands in Borough of Brooklyn, 2 Cir., 129 F. 2d 577, 579. (Italics added)

And consistently with the above, the Supreme Court held in *Danforth v. United States,* 308 U. S. 271, 283, 284, 60 S. Ct. 231, 84 L. Ed. 240 (1939), that: *"For the reason that compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment."* (Italics added)

In view of the law settled by the cases cited above, it is clear that the Government proceeded in rem when on February 23, 1943, it filed its petition in condemnation and obtained an order granting it the immediate right of possession (R. 2-16). And the Government obviously proceeded in rem when on April 1, 1943, it took actual possession of the District's irrigation properties (R. 307). It is likewise clear that the Fifth Amendment requires that the Government pay as just compensation the full and perfect equivalent in money of the irrigation properties taken—$365,845, as determined by the jury (R. 1132). It is clear that the $365,845 award when made would stand in the place of the irrigation properties taken; and that the rights of the owner District and of the bondholders having a lien on the irrigation properties would be treated as though transferred to the award.

Yet, contrary to the well established law cited above, the judgment of the district court limits compensation for the District's irrigation properties to the Government's deposit of $170,500—$195,345 less than the full equivalent in money as determined by the jury.

There have been variety and inconsistency in the procedural and substantive theories, which have been used in the Government's attempt to carry its "acquisition policy" into effect, and which in part were incorporated into the Schwellenbach for-

mula. The variety and inconsistency are shown in the following sections of this brief.

II

The Government, Contrary to Established Law and the Record, Attempted Use of the Ancillary Proceedings Provided By the Declaration of Taking Act As Separate and Independent Proceedings to Carry the Government's "Acquisition Policy" into Effect.

As Judge Schwellenbach stated (R. 102-103), the Government in May, 1943, asserted that it "intended to acquire all of the property within the District, as a result of which it would then become the owner of the facilities and instrumentalities of the District." He further noted in the April 26, 1944 proceedings (R. 100, at 105) the desire of the Government to acquire all the property within the District before filing a declaration of taking as to the District's properties. The Government sought, by selective timing of its amended petitions and declarations of taking in *United States of America vs. Clements P. Alberts,* No. 128, to use the ancillary procedure of the Declaration of Taking Act, 46 Stat. 1421, 40 U. S. C. sec. 258 (a), as a device for carrying its substantive "acquisition policy" into effect.

But in that attempt the Government disregarded what it had already done. It had commenced condemnation, and had obtained orders granting the

right of immediate possession, of *both* the lands within the District and the properties of the District itself by the original petitions and orders of February 23, 1943 (R. 2-16) and April 22, 1943 (R. 16-32). And pursuant to those orders, granted under the "Second War Powers Act, 1942," the Government took actual possession of the District's irrigation properties on April 1, 1943, and took actual possession of the District's power properties on October 1, 1943 (R. 307).

The condemnation proceeding commenced on February 23, 1943 was and is one action, a single suit, even though separate trials were given the several amended petitions, and even though the Government substantially controlled the division of the suit for separate trials by filing amended petitions more particularly describing various, comparatively small, groups of tracts.

> *Atlantic Coast Line. R. Co. v. United States,* 132 F. (2d) 959, 962 (CCA 5th 1943);
>
> *United States v. 12,918.28 Acres of Land in Webster Parish,* 50 F. Supp. 712, 721 (D. C., W. D. La. 1943).

Furthermore, the Declaration of Taking Act provides merely an ancillary proceeding. It does not provide a separate, independent proceeding. As the Supreme Court, on January 4, 1943, stated in *United States v. Miller,* 317 U. S. 369, 380-381, 63 S. Ct. 276, 87 L. Ed. 336, with regard to the dec-

laration of taking procedure: "Thus the acquisition by the Government of title and immediate right to possession, and the deposit of the estimated compensation, occur as steps in the main proceeding." Likwise, in *Catlin v. United States,* 324 U. S. 229, 240, 65 S. Ct. 631, 89 L. Ed. 911 (1945), the Supreme Court held that the procedure of the Declaration of Taking Act for paying deposits into Court and vesting title in the Government is merely ancillary to the main condemnation proceeding. This Court followed the Catlin case in *Polson Logging Co. v. United States,* 149 F. (2d) 877 (CCA 9th 1945).

The "taking" of the District's properties, within the meaning of the Fifth Amendment, was commenced on February 23, 1943 (R. 2-16) and was completed no later, in point of time, than April 1, 1943, as regards the District's irrigation properties and no later than October 1, 1943, as regards the District's power properties (R. 307).

The Government's theory that it acquired the District's properties by becoming successor in interest thereto, piecemeal, as the Government acquired individual tracts within the District is fallacious in view of the record that the Government *took* the District's properties in condemnation and took possession under the Government's right of immediate possession pursuant to the Second War Powers Act, 1942.

It should be noted that the Government's attempt to carry out its "acquisition policy" by novel use of declarations of taking is apparently *ad hoc,* for the Hanford project alone. In the recent case of *Comparet v. United States,* 164 F. (2d) 452 (CCA 10th 1947) the petition in condemnation was filed on June 15, 1942 and, pursuant to the Second War Powers Act, 1942, an order of immediate possession was entered the same day. Declaration of taking was filed about six months later. At the trial in June, 1945, the court instructed the jury (164 F. (2d) 452) that it should "value the land taken by the Government, according to its actual fair market value on the 15th day of June, 1942, which was the date upon which the United States acquired title to the property." The landowner appealed contending that valuation, under Colorado law, should have been as of the June 1945 trial date. The Government, appellee, successfully contended for affirmance of the district court. From the following authorities cited in the appellate court's affirming opinion, it may be assumed that the Government did not question *Olson v. United States,* 292 U. S. 246, 255, 54 S. Ct. 704, 78 L. Ed. 1236 (1934) in which the Supreme Court held that just compensation "is the market value of the property at the time of the taking contemporaneously paid in money." — and that the Government did not question *11,000 Acres of Land v. United States,* 152 F. (2d) 566, 568 (CCA 5th 1945), in which the court said:

> We regard it as well settled that, either where no declaration of taking is filed or where, as here, the declaration of taking is filed on the date subsequent to the actual passing of possession, the market value of the property taken should be determined as of the date possession was acquired.

It may likewise be assumed that the Government did not contend that the rules recognized in the above cases had been changed by the Declaration of Taking Act. — In affirming the district court, the appellate court stated (164 F. (2d) 452, 453):

> When on June 15, 1942 the petition of condemnation was filed and an order of immediate possession entered, appellant was deprived of her property and the United States had the right of possession. * * * When the Government acquired possession in 1942 there was a "taking" of appellant's property for public use; compensation therefor was then due and payable, and under the Federal rule of decisions its fair market value should be determined as of that date.

Similarly, the Government as appellant in this Court in *United States v. Block,* 160 F. (2d) 604, 607 (CCA 9th 1947), contended that certain machinery and equipment "were taken" on (and should have been valued as of) September 28, 1942, when an order granting right of immediate possession of an oil leasehold was entered. The Government made that contention, although a declaration of taking was not filed until four weeks later and although the record was silent as to when pos-

session of the equipment was taken, and although an amended complaint covering "personal property" was not filed until January 12, 1944.

Obviously, the Government's position in the Comparet and Block cases, *supra,* is inconsistent with the Government's theory that it did not take the Priest Rapids Irrigation District's irrigation properties on February 23, 1943 (R. 2-16) or April 1, 1943 (R. 307), but that instead it "succeeded" piecemeal to those properties as it subsequently acquired individual tracts of land within the District's boundaries.

III

Prior to Trial in No. 128-99, There Was No Determination or Award of Just Compensation for Any of the District's Properties.

Soon after the original petitions and orders for possession in No. 128, dated February 23, 1943 and April 22, 1943 (R. 2-32), and soon after the Government, pursuant to the order of February 23, 1943, took actual possession of the District's irrigation properties on April 1, 1943 (R. 307)—the Priest Rapids Irrigation District moved for an order establishing sequence of trial (R. 33). As the record shows, that motion was in the alternative:

> that the above entitled case be set down for trial as against this defendant [District] in advance of the trial of any and all cases against owners of land within the boundaries of Priest Rapids Irrigation District, *or* that if cases of

> the United States against individual owners of land are tried in advance of the case against this defendant, the value of its assets described in the following affidavit, distributable to such individual owners, be excluded from consideration in the award of damages or compensation to be paid to such individual owners, * * *. (Italics added)

As Judge Schwellenbach stated, in the April 26, 1944 proceedings (R. 100-105, at 103), that effort of the District in May 1943 was resisted by the Government, the Government "asserting it intended to acquire all of the property within the District, *as a result of which* it would *then* become the owner of the facilities and instrumentalities of the District." (Italics added) — In view of the Fifth Amendment and the law well settled by federal court decisions, Judge Schwellenbach's next sentence (R. 103) accurately describes the Government's position: "This presented an entirely new proposition of law."

At Judge Schwellenbach's suggestion (R. 103), it was agreed that in the trial of the first landowner's case there would be made, on behalf of the landowner, an offer of proof of the value of the District's properties; that Judge Schwellenbach would deny the offer; and that an appeal would be expedited.

That procedure was abandoned, as Judge Schwellenbach stated (R. 103), in part due to the statement by Government counsel and agreement "that

the Government would proceed expeditiously with the filing of the declarations of taking on the properties of the Irrigation District." The change in the agreed procedure was for further reasons, stated by Judge Schwellenbach in his memorandum opinion of June 21, 1945 (R. 175-181, at 178; see App. "A" this brief). In that opinion on the Government's demurer to the District's answer in No. 128-99, Judge Schwellenbach stated, in rejecting the Government's contention that through the District in No. 128-99 the landowners were "attempting to take a second bite at the apple" (R. 178):

> The fact is that, in the first case which was tried, the landowner attempted to assert his claim to his proportionate share in the District's assets, the petitioner objected and I rule (*sic*) against the landowner. The basis of this ruling was that in the trial for the purpose of determining the compensation to be paid for a separate tract, there was no room to try out also the value of that landowner's proportionate share of the District assets. He was not the owner of the legal title to the District assets. He had no right to assert a direct claim to his proportionate share. Furthermore, as a matter of procedure, if I had permitted each landowner to assert his claim in each separate trial, it would have resulted in chaos and interminable delay as a consequence of which this (*sic*) cases never would have been completed. Imagine the situation in each case of having the voluminous testimony as to the value of District assets presented to each separate jury. Furthermore, it would have resulted in an absurd situation because the landowner in one case would have a jury fixing one value upon the District's as-

> sets and then the jury in the next case might place an entirely different value upon the District's assets. The awkwardness and the confusion which would have resulted was realized by counsel on both sides and dozens of cases have been tried since with the understanding that, at some time, the question of the right of the landowners to their proportionate share of the value of the District assets would be thrashed out.

That neither the landowners nor their District got a first "bite at the apple" in the trial of the first landowners' case in October 1943 is obvious from the record of their offer of proof as to the value of the properties of the District itself (R. 84-92) and from the record of the Government's successful objection (R. 96-99).

The varied and inconsistent reasons for the Government's successful objection to the offer of proof show the Government's attempt to avoid *any* determination or award of compensation for the District's properties. The reasons given were (R. 96):

> for the reason that the value of the assets of the District and the lands are fully reflected in the appraisal of those lands as irrigated tracts.
>
> For the further reason that there is no property interest in the assets of the District as to the lands or the owners of the lands until such time as the District has been dissolved under the provisions of the laws of the State of Washington, and that at the time of the taking there was no dissolution of the District and for the further reason that at the time of the taking

> any equitable right of the lands or the owners in the facilities of the District passed with the title itself and that the Government in taking the full fee simple title to the property acquired any equitable interest which either the lands taken or the owners of the lands taken as of that date may have had.

At that point, the Government was contending that it was acquiring interests in the District's properties piecemeal as it acquired the privately owned lands within the District, *and at the same time* the Government was succeeding in keeping away from the juries in the landowners' cases any evidence as to the value of the District's properties which the Government contended it was thus acquiring piecemeal.

It is significant that the amended petitions and declarations of taking covering individual tracts within the Priest Rapids Irrigation District did *not* cover any of the District properties. Furthermore, they expressly excluded any District property that might be on the tracts, as shown by the description of the tracts covered by the amended petition in No. 128-43 (R. 72):

> The full fee simple title thereto, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, and *for existing irrigation ditches, canals, and laterals owned by the Priest Rapids Irrigation District* in and to the following described lands, to-wit: (Italics added)

In the individual landowners' cases, neither the amended petitions nor the evidence covered the District's properties.

Yet, the Government contends that the value of the District's properties was reflected in the appraisal of the landowners' tracts; and the Schwellenbach formula, as regards the District's irrigation properties, accepts the Government's "acquisition policy."

Incidentally, it should be noted that some of the farms within the District were not dependent upon the District's facilities for irrigation water supply. When Judge Schwellenbach ruled against the offer of proof on behalf of landowners Parke, Wright and Shaw (R. 97, 98), he recognized the existence of that situation on some of the tracts there involved. Also, there was uncontroverted testimony in the trial of No. 128-99 (R. 344) that quite a few owners of land within the District obtained their irrigation water by pumping from wells, instead of receiving service from the District.

Judge Schwellenbach in his memorandum opinion of June 21, 1945, (R. 175-181, at 179; see App. "A" this brief) based his partial acceptance of the Government's contention on his statement that "In each one of the trials and in all of the appraisals, the value of the separate tracts was upon the proposition that they were within the irrigation district and had irrigation water available."

But that is no different than determining value of land upon other propositions such as: it is within the service area of a railroad, and it is within the service area of a light and power utility. As the record shows, the amended petition of April 22, 1943 in No. 128, besides adding an additional area, also included railroad easements of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company (R. 17-18, 128c). Availability to a landowner's tract of a water supply from the District contributed to value of the farm just as did the farm's having available railroad service furnished by the Chicago, Milwaukee, St. Paul Railroad, or as the farm's having available electric light and power service from the Pacific Power & Light Company (R. 344).

Of course, the availability of an irrigation water supply from the District's irrigation properties made possible the development of many tracts into irrigated farms that had substantial value, justifying substantial awards of compensation. — Likewise, availability of a water supply from a private ditch company makes possible the high value development of an orchard served by the private ditch company. So too, the value of a farm depends in part upon availability of railroad service and power and light service.

Moreover, values of farms within the District, and values of the District's properties and of the railroad and power utility properties, were mutual-

ly dependent in part. But that fact did not and could not relieve the Government from the constitutional requirement that it pay just compensation for the railroad properties it took for the purposes of the Hanford project. Nor can that fact relieve the Government from the same requirement that it pay just compensation for the District's properties it took for the same purpose.

> *United States v. Puget Sound Power & Light Co.,* 147 F. (2d) 953 (CCA 9th 1945);
>
> *Brooklyn Eastern Dist. Terminal v. City of New York,* 139 F. (2d) 1007, 1013 (CCA 2nd 1944), cert. den. 322 U. S. 747, 64 S. Ct. 1158, 88 L. Ed. 1579 (1944);
>
> *Town of Bedford v. United States,* 23 F. (2d) 452 (CCA 1st 1927);
>
> *United States v. 25.4 Acres of Land,* 71 F. Supp. 248, 251 (D. C., E. D. N. Y. 1947).

In the Brooklyn Eastern Dist. Terminal case, *supra,* the condemnation proceeding was by the United States against certain land in Brooklyn owned by the City, which had an agreement with the Terminal. The latter petitioned for an award of compensation and the City opposed. The appellate court held that under the agreement the Terminal had an easement over the City's waterfront property and for that easement compensation must be paid, as it must be paid for railroad rights of

of way. In the course of its opinion, the court noted (139 F. (2d) 1007, 1013) that the measure of compensation to the Terminal could not be the amount by which the value of the servient land was lessened by reason of the easement. The easement, if anything, added to the value of the servient land; and in accordance with *United States v. Miller,* 317 U. S. 369, 373, the compensation to meet the constitutional requirement must be the full and perfect equivalent in money of the property taken.

Just as the Terminal's easement, if anything, added to the value of the servient land, so utility services, or irrigation services from a private ditch company or irrigation district, add to the value of property. And the full and perfect equivalent of just compensation includes not only the value of the property served but also the value of the property that renders the service.

United States v. 25.4 Acres of Land, 71 F. Supp. 248, 251 (D. C., E. D. N. Y. 1947) was concerned with part of the some condemnation involved in *Eastern District Terminal v. City of New York, supra.* In the 1947 aspect of that proceeding, regarding compensation to be paid privately owned utilities, the Government made a contention similar to that made against the Priest Rapids Irrigation District. In that 1947 case, the district court flatly rejected the Government's argument (71 F. Supp. 248, 251):

It is also argued by the Government that since the awards made for damage parcels privately leased from the City of New York were based in part upon their being in receipt of gas and electric current for consumption on those respective premises, the awards made in connection therewith must be deemed to have embraced the claims now asserted, and claimants' compensation should have been carved therefrom.

It is difficult, if not impossible, to follow that argument. The testimony of the expert on damage parcel values was imported into this record by consent, and is as follows:

"'Q. Your value of this entire property as an entity reflected all of the street improvements, including pavements, water mains, sewers, lighting and so forth, did it not?'

"The answer is 'A. All that you have enumerated. It includes all you have enumerated. It did not include any refrigeration service. It included the regular utilities like water, gas, electricity and street pavements and sewers.'"

The obvious meaning of the foregoing is that the damage parcels were appraised as being improved in the respects indicated; the testimony had nothing to do with the mains, conduits, etc., which lay in the beds of the streets and ways, nor could it, since those things did not form a physical part of any of the several damage parcels, but constituted properties of these claimants.

Furthermore, if the owner of a farm owned stock in the utility corporation that served his farm with light and power, the utility would none the less have to be paid the full and perfect equivalent of

the serving power lines, etc., that were also taken—even though upon a dissolution of the utility corporation the farmer would share in a distribution of the utility's assets including the condemnation award for the utility properties taken.

IV

No State Statute or Judicial Decision Can Effect the District's Substantive Right To Be Paid Just Compensation for ALL *of Its Properties.—Moreover, the Government's Contention Is Based On Misconstruction of State Law.*

The Government in October 1943 (R. 96) and subsequently, in pressing its "acquisition policy" regarding the Priest Rapids Irrigation District's properties, has relied on the Government's construction of the law of the State of Washington pertaining to irrigation districts and their dissolution. In so doing the Government has disregarded federal condemnation law and has misconstrued the law of the State of Washington.

As the Supreme Court held in *United States v. Miller,* 317 U. S. 369, 379, 63 S. Ct. 276, 87 L. Ed. 336 (1943), in rejecting a landowner's attempt to use state law to increase compensation as measured by federal law:

> We need not determine what is the local law, for the federal statutes upon which reliance is placed require only that, in condemnation proceedings, a federal court shall adopt the forms and methods of procedure afforded by

> the law of the State in which the court sits. They do not, and could not, affect questions of substantive right—such as the measure of compensation—grounded upon the Constitution of the United States.

On this point, the Miller case has been followed by this Court in *United States v. State of Montana,* 134 F. (2d) 194, 197 (CCA 9th 1943), cert. den. 319 U. S. 772, 63 S. Ct. 1438, 87 L. Ed. 1720 (1943); and by the Third Circuit in *United States v. Certain Parcels of Land,* 144 F. (2d) 626, 628 (CCA 3rd 1944). See also, *United States v. Indian Creek Marble Co.,* 40 F. Supp. 811, 818 (D. C., E. D. Tenn. 1941); *Town of Bedford v. United States,* 23 F. (2d) 453 (CCA 1st 1927); *United States v. Wheeler Tp.,* 66 F. (2d) 977, 981 (CCA 8th 1933).

As the court stated in *United States v. Wheeler Tp., supra*:

> The Fifth Amendment prohibits the United States from taking private property for public use without just compensation and those entitled to the protection of that provision cannot lose that right because of any state constitution, statute, or judicial decision.

The Government has relied (R. 388) on the Washington case of *In re Horse Heaven Irrigation District,* 11 Wn. (2d) 218, 118 P. (2d) 972 (1941), in its attempt to carry into effect its "acquisition policy" regarding the Priest Rapids Irrigation District's properties. However, the Horse Heaven District was dissolved pursuant to the provisions of

Washington's statutes, Chapter 79, Laws of 1897, p. 207, as amended by Chapter 149, Laws of 1939, p. 447 (Rem. Rev. Stat., Secs. 7526-7530). The 1897 Act provided for disorganization of an irrigation district "which has no bonded indebtedness outstanding,"—and the Priest Rapids Irrigation District, as the record clearly shows (R. 117, 142-160), did have bonded indebtedness when the Government took its properties in 1943. It still had bonded indebtedness in 1944 when the Government finally filed its amended petition and declaration of taking in No. 128-99. Furthermore, the 1939 Act involved in the Horse Heaven case was applicable to an irrigation district of the State of Washington which has no bonded indebtedness outstanding "and which has been in existence for more than twenty (20) years without having secured the irrigation of any of its lands." The Priest Rapids District had irrigated lands within the District. Obviously, therefore, the statutes involved and construed in the above mentioned state case were and are inapplicable to the Priest Rapids Irrigation District.

Moreover, in the Horse Heaven case (which was a five to four decision), Mr. Justice Millard, in his opinion for the majority, stated that the "property holders" of the District included contract purchasers "who, to protect their contracts, *must pay such assessments as are levied against the land which is the subject of those contracts.* The contract purchasers are *members of the group which is*

really interested in the success of the District; those who have to meet its burdens." 11 Wn. (2d) 218, 237 (Italics added).

In other words, the "property holders" in whose favor the Washington court decided in the Horse Heaven case (under statutes inapplicable to the Priest Rapids Irrigation District) were those who were subject to assessments by the District, "those who have to meet its burdens." — There is nothing in the record which shows that the United States, as condemnor of the lands within the District, in *United States v. Alberts,* No. 128, took those lands subject to past or future assessments or burdens of the District. And it is well settled that the United States did not acquire said land subject to any such assessments or burdens.

> *Washington Water Power Co. v. United States,* 135 F. (2d) 541, 543 (CCA 9th 1943);
>
> *United States v. 25.936 Acres of Land, Etc.,* 153 F. (2d) 277, 279 (CCA 3rd 1946).

Furthermore, even as regards lands it purchases in an irrigation district, the Government is not among those landowners "who have to meet its burdens." See *United States v. Cottonwood Irrigation District,* 19 F. Supp. 740 (D. C., N. D. Calif. 1937) where the Government set aside and cancelled liens created by assessments levied subsequent to purchase by the Government.

As regards the pending state court proceeding involving the Priest Rapids Irrigation District (R. 252-267), the case of *State ex rel Pryor v. Paul,* 5 Wn. (2d) 90, 94, 104 P. (2d) 745 (1940), is pertinent. There the Washington Supreme Court, after ruling that the county court had obtained jurisdiction of a trust estate (made up of properties of the Horse Heaven Irrigation District), then proceeded to hold:

> In such cases, in the absence of prescribed statutory procedure, a court of equity has inherent power to administer the trust estate and see that it is distributed to the persons who are entitled to share in it; and the court may proceed either upon its own motion or upon the application of the trustees or beneficiaries.

Moreover, as Judge Driver ruled on June 1, 1946 (R. 288-289); see Appendix "B", this brief):

> the matter of liquidation of an irrigation district is primarily a matter for the State Court, and while I appreciate the fact that in a condemnation proceeding not only must the value of the property taken be determined but also the persons who are entitled to receive it, nevertheless, it seems to me, that in this situation the person entitled to receive the compensation is the irrigation district, a legal entity. And if I should attempt to determine who is entitled upon liquidation of that corporation to its assets, I would be simply dissolving an irrigation district in Federal Court, which is not altogether necessary in a condemnation case or a part of it, as I view it. Certainly, if the Government took over the assets of a private corporation, we would not undertake to

> pay the award to the stockholders. It would be paid to the corporation even though all of the property of the corporation might be taken in the motion (*sic*), and it would be the duty then of the corporation to determine who is entitled to its assets; and I think that is the situation here.

That ruling by Judge Driver is in accord with applicable decisions of the federal courts. In *United States v. 25.936 Acres of Land, Etc.,* 153 F. (2d) 277, 279 (CCA 3rd 1946), the court stated:

> * * * No New Jersey court has passed upon the precise questions of law presented by the circumstances at bar. It is appropriate, therefore, to require the Borough and Corn Products to seek an answer in the courts of New Jersey either under the New Jersey "uniform declaratory judgments law", N. J. S. A. 2:26-66 et seq., or otherwise. See United States v. 150.29 Acres of Land. Etc., in Milwaukee C., Wis. supra, 7 Cir., 135 F. 2d at page 881, and the approving reference to the procedure therein indicated by the Supreme Court in Spector Motor Co. v. McLaughlin, 323 U. S. 101, 105, 106, 65 S. Ct. 152.

The Government's contention regarding the District's properties is based on the Government's construction of state law—a construction of state law that the Washington court certainly has never applied to circumstances like those of the Priest Rapids Irrigation District. Furthermore, the District's defense against the Government's contention places in issue the constitutionality of the condemnation adjudication sought by the Government. And as

the Supreme Court stated in its opinion in *Spector Motor Co. v. McLaughlin,* 323 U. S. 101, 105, 65 S. Ct. 152, 89 L. Ed. 101, "we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law."

However, it is sufficient refutation of the Government's contention and of that part of the Schwellenbach formula which is adverse to the District, to refer again to the well settled law of the federal courts that the substantive law requirement of just compensation guaranteed by the Fifth Amendment can not be modified by reason of a state statute or a state court decision (pp. 45-46, *supra*).

It is clear that the district court's judgment (R. 1147-1158) is in error to the extent that it deprives the District of $195,345 of the value of the District's irrigation properties as determined by the jury. It is manifest that the lower court's judgment should be reversed with instructions to enter a deficiency judgment in favor of the District in the amount of $668,701, together with interest as specified in the District's proposed judgment (R. 1138, at 1146).

ANSWER TO BRIEF FOR THE UNITED STATES, APPELLANT

I

Government's Basic Contention Seeks to Avoid Constitutional Question of Just Compensation and Ignores Record of What Government Did.

The basic contention of the Government is stated in its brief[1] on appeal (App. Br. 10) as follows:

> By acquiring at fair market value all of the lands in the Priest Rapids Irrigation District the United States acquired the beneficial title to the properties held by the district for the owners of land in the district and was entitled to the legal title thereto without a further payment for the benefit of the former landowners.

That statement of the Government's basic contention, and the argument made in support of it (App. Br. 10-22), show that the Government seeks

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[1] The "specification of errors" in the Government's brief (App. Br. 10) does not comply with rule 20 (d) of this Court, particularly as regards Nos. 2 and 3 of the Government's point on appeal (R. 1169, 1181) which were directed at the district court's overruling a Government objection to introduction of testimony and refusing to give an instruction to the jury requested by the Government. More significantly, perhaps, the Government's general specification of error No. 1 avoids restatement of the Government's points on appeal Nos. 2 and 5 (R. 1169, 1181), in which the Government refers to properties of the District "acquired by the United States through the filing of the declaration of taking in No. 128-99." Acquisition "through the filing of the declaration of taking in No. 128-99" is a theory inconsistent with the theory of the Government's basic contention as stated in its brief (App. Br. 10).

to avoid and beg the issue of constitutional law raised by the "acquisition policy established by this [War] Department and approved by the Department of Justice," (R. 83) and involved in the proceedings in the district court. It ignores what the record shows—that the Government took the District's properties in condemnation. It ignores the constitutional requirement that for property which it takes for public purposes the Government must pay "just compensation"—the full and perfect equivalent in money of the property taken (see pp. 26-29, *supra*).

The Government states in its brief that "By acquiring at fair market value all the lands in the Priest Rapids Irrigation District the United States acquired the beneficial title to the properties held by the District for the owners of land in the District"—but the record shows that in acquiring the lands within the District the Government took fee title in said lands, subject to easements of the District (R. 72). And the record shows that on the Government's objection the district court kept from the juries, which determined the value of said lands, any evidence of the value of the District's properties to which the Government contends it acquired beneficial title by acquiring the lands within the District (R. 84-99, 100-105). The record also shows that when the Government, in the October 1943 proceedings regarding landowners' tracts, suc-

cessfully made that objection it contended (R. 96) "that there is no property interest in the assets of the District as to the lands or the owners of the lands until such time as the District has been dissolved under the provisions of the laws of the State of Washington, and that at the time of the taking there was no dissolution of the District * * *."

At the same time and in the same sentence (R. 96) the Government played both ends against the middle and contended that any equitable right, of the lands within the District or of the landowners, in the District's properties passed with the title to the lands within the District and that the Governmen thereby acquired any equitable interest which the lands within the District, or the landowners, may have had. But the record shows that Judge Schwellenbach in his memorandum opinion (R. 175-181, at 178; Appendix "A" this brief) stated that he had ruled against the landowner's attempt to assert his claim to a proportionate share of the District's properties for the reason, among others, that the land owner *"was not the owner of the legal title to the District assets. He had no right to assert a direct claim to his proportionate share."* (Italics added)

The record shows that, again, at the trial of No. 128-99, the Government objected to the introduction and reception of any and all testimony as to the value of the District's properties (R. 387-390). And the Government in its points on appeal (No. 2, R.

1169, 1181) states that the district court's overruling of that objection was error. — It is apparent, from the 1182 page record and the Government's brief, that the Government has sought to avoid *any* judicial determinataion of value of the District's properties taken under the "Second War Powers Act. 1942."

A. *Answer to Government Argument I, A*

In the section of its brief (App. Br. 10-12) headed "The United States did not cause the former landowners to believe they would receive more than the fair markt value of their lands," the Government makes the point that its basic contention was made known before the first trials regarding landowners' tracts. That point may be conceded, but the Government's brief does not reflect what the record shows.

The procedural record of the proceedings is contained in the Transcript of Record. And certainly Judge Schwellenbach's statement during the April 26, 1944 proceedings (R. 100-105, at 102)—to which the Government's brief does not refer—and Judge Schwellenbach's memorandum opinion (R. 175- 181; Appendix "A" this brief) are controlling, rather than an affidavit of Government counsel, executed after the Government took this appeal, and presented for the first time in the Government's brief. A detailed account of the pertinent proceedings *as shown by the record* is set forth in part III of this brief of the District, pp. 35-45, *supra.*

The Government's brief (App. Br. 10-12) possibly argues inferentially that a judicial determination of just compensation for the District's properties could have been had only in connection with the trials regarding the individual landowners' tracts. But any such inferential argument can not stand in view of the condemnation proceeding filed February 23, 1943 (R. 2-10) being one action, a single suit. *Atlantic Coast Line R. Co. v. United States,* 132 F. (2d) 959, 962 (CCA 5th 1943). Nor can it stand in view of the limited character of property covered by the amended petitions and declarations of taking regarding individual farm tracts (R. 72). Nor can it stand in view of the Government's position in October 1943 that judicial determination of the value of the District's properties could not be had in connection with trials regarding the landowners' tracts for the reason that there could be no property interests in the assets of the District as to the individual tracts or the owners thereof until such time as the District has been dissolved under the laws of the State of Washington (R. 96). Nor can any such argument stand in view of the record (R. 103-104) that at the first trial in October 1943 it was agreed that the Government would proceed expeditiously with the filing of a declaration of taking as to the properties of the District.

B. *Answer to Government Argument I, B*

In further attempted support of its basic conten-

tion, the Government argues (App. Br. 12-14) that "The United States has already paid the former landowners the fair market value of their lands." That argument is like the Government's argument which was rejected in *United States v. 25.4 Acres of Land,* 71 F. Supp. 248, 251 (D. C., E. D. N. Y. 1947), where the Government sought to avoid paying just compensation to public utilities on the ground that individual damage parcels which had been serviced by the public utilities had been valued as parcels having service from the water, gas and electric utilities. Further and complete answer to that argument appears in part III of this brief, pp. 35-45, *supra.*

The Government (App. Br. 12-14) has reiterated its factual-legal argument, as Government counsel with commendable candor predicted during the trial of No. 128-99 (R. 738-739):

> The contention of the Government has been and it has been reiterated and unquestionably will be again, that the value of those District facilities as irrigation facilities necessarily are reflected in the value of the land.

It was because of that reiterated contention that the District, during the trial of No. 128-99 (R. 729-745) offered to prove from the records in No. 128 that for all of the lands within the District, including all of the improvements on said tracts as well as any crops growing thereon, the Government paid only $630,960.80 (R. 741-743). — The offer of proof

was made in the absence of the jury and for the purpose of presenting to the court evidence which would refute that factual-legal contention of the Government, when compared with the value of the District's properties to be determined by the jury's verdict and answer to special interrogatory in No. 128-99. (The jury's verdict and answer showed the total value of the District's properties to be $839,-201 R. 1131-1132). The Government objected to that offer of proof (R. 743); and the court sustained the objection and rejected the offer on the substance of the offer (R. 745), the court recognizing and assuming that the documents from the voluminous district court file in No. 128 could and would be brought into court to show by piecemeal documentary evidence what compensation the Government had paid for each individual tract of land within the District.

Notwithstanding its objection to that offer of proof in the district court, the Government in its brief on appeal prints as an appendix (App. Br. 27-31) and quotes at length from an affidavit of Government counsel. By that affidavit and for the first time upon this appeal, the Government offers "ex parte" evidence as to the compensation paid by the Government for land within the District. — Obviously, the Government's use of Government counsel's affidavit is strikingly inconsistent with the Government's objection in the district court to evidence of the same character and offered, in the

absence of the jury, as having bearing on the same point.

The Government in its brief italicizes Government counsel's affidavit statement that in the trial of the individual tracts the landowners were permitted to show "all other factors which might be legally shown as affecting the value of the premises as between a prospective seller and a prospective buyer." (App. Br. 13) Yet, the same Government counsel in the October 1943 trial of individual tracts successfully contended that evidence of the value of the District's properties could *not* be legally shown (R. 96). And in the trial of No. 128-99 in the district court, the Government contended that such evidence could *not* legally be shown (R. 387-390). — In other words, the Government has contended throughout the various proceedings, in the condemnation action No. 128, that the Government should be permitted to take the District's properties without *any* judicial determination of the value of the properties taken.

The Government's use in its brief on appeal of "evidentiary" matter which is not in the record on appeal, and which the Government did not offer in the district court, is clearly contrary to federal court decisions. As this Court held in *Hovland v. Smith,* 22 F. (2d) 769, 770 (CCA 9th 1927):

> The appellant relies on two affidavits, which in his brief he presents to this court; but they are not included in the bill of exceptions, and

> it must be presumed that they were not brought to the attention of the court below. Such being the case, they have no place in a review of the judgment of that court.

To the same effect are this Court's decision in *Leonard v. Field,* 71 F. (2d) 483, 487 (CCA 9th 1934), and the decisions in *Bono v. United States,* 113 F. (2d) 724, 725 (CCA 2nd 1940) and *Drake v. General Finance Corp. of La.,* 119 F. (2d) 588, 589 (CCA 5th 1941).

C. *Answer to Government Argument I, C*

The Government further argues (App. Br. 14-17) that "The properties of the District were wholly devoted to irrigation purposes and were inseparable from the lands they served." This argument is inaccurate; and even if it were accurate it would not be relevant to the question of whether the Government can take the District's properties without payment of just compensation.

The irrelevance is shown by an analogy and by federal court decisions. The railroad property of the Chicago, Milwaukee, St. Paul & Pacific Railroad Co. taken by the Government (R. 17-18, 128c) was devoted to railroad purposes, rendering common carrier service to the lands within the District and adjacent lands. Incidentally, that railroad property was so tied to servicing that area that, by law, it could not be abandoned by the railroad company, unless the Interstate Commerce

Commission granted permission (Act of Feb. 28, 1920, c. 91, sec. 402, 41 Stat. 477, 49 U. S. C. 1 (18)). Furthermore, the value of that railroad property depended upon traffic to and from the lands it served; and, in turn, the value of lands within the District reflected the availability of that railroad service. But the Fifth Amendment required just compensation for the railroad property taken by the Government, measured by the value of the railroad property. *Brooklyn Eastern Dist. Terminal v. City of New York,* 139 F. (2d) 1007, 1013 (CCA 2d 1944), cert. den. 322 U. S. 747; *United States v. 25.4 Acres of Land,* 71 F. Supp. 248, 251 (D. C., E. D. N. Y. 1947). See also, *United States v. Buxton Lines, Inc.,* CCA 4th, decided February 3, 1948, 16 L. W. 2403.

Likewise, as regards the District's properties, whether used to render irrigation or commercial power services.

The inaccuracy of the Government's argument is apparent upon examination of the laws of the State of Washington which authorize the District's board of directors to "develop and to *sell,* lease, or rent the use of water or power * * * at such prices and on such terms as it deems best" (Italics added) (Rem. Rev. Stat., sec. 7428, L. '21, p. 432, sec. 5) and which authorize the District to sell surplus electrical energy "to municipalities, public and private corporations and individuals, on such terms and conditions as the board of directors shall de-

termine'' and to make such sales for periods longer than ten years with ratification by a District election (Rem. Rev. Stat., sec. 7417-2, L. '33, p. 181, sec. 1).

Incidentally, as regards the Government's statement that further irrigation water requirements ''would have to be satisfied by use of additional power'' (App. Br. 15), it should be noted that the record shows otherwise. Quite a few farmers within the District obtained their water supply by pumping from wells, using power supplied by the Pacific Power & Light Company (R. 344; see also, R. 98).

Furthermore, the question of what increase in the District's irrigation pumping load there might be within the reasonably near future was properly left to the jury (R. 1106). Moreover, neither that charge to the jury nor the instructions regarding percentages about which the Government argues (App. Br. 16-17) was made a point on appeal (R. 1169-1181) or specified as an error (App. Br. 10).

The Government's speculative argument ignores both the realities of the situation, and the law. As the Supreme Court in *Monongahela Navigation Co. v. United States,* 148 U. S. 312, 344, 13 S. Ct. 622, 37 L. Ed. 463 (1893) had occasion to state, the Government in condemnation ''is proceeding not as the assignee, successor in interest, * * * but by virtue of its own inherent supreme power.'' To

paraphrase the district court's opinion in *United States v. Gossler,* 60 F. Supp. 971, 973 (D. C., D. Ore 1945), a case of some similarity—the question is not the legal relationship between the landowners and the District, but whether the Government took the District's properties for which the condemnor must pay. In view of *United States v. 53¼ Acres of Land,* 139 F. (2d) 244, 277 (CCA 2nd 1943), cert. den. 322 U. S. 730, it is abundantly clear, not only that the Government must pay for the District's properties a just compensation award, but also that the award "stands as a substitute for the land," and that *"condemnation should affect the rights of the parties having interests in respect to the land taken only so far as necessary to assure the sovereign's title."* (Italics added)

Under the Government's theory, if a future "Hanford project" required acquisition of all the property within a municipality or public utility district which owned the electric utility serving it, then upon acquisition by the Government of the privately owned lands at values which reflected the value of availability of electric service but which did not reflect the value of the electric power system owned by the municipality or public utility district, the Government would acquire the electric power system without paying any compensation for it. — But the Fifth Amendment's requirement, that the Government pay just compensation for property it takes, does not depend upon own-

ership of an electric power utility or irrigation utility being in someone other than the owners of the lands served or an organization of the landowners. The Government must pay just compensation for property it takes.

D. *Answer to Government Argument I, D*

In its argument that "In parting with their lands in the District, the former owners divested themselves of all interest in properties held beneficially by the District for landowners" (App. Br. 17-20), the Government places untenable reliance on the state court decision in *In re Horse Heaven Irrigation District,* 11 Wn. (2d) 218, 118 P. (2d) 972 (1941). As pointed out in part IV of this brief, the constitutional requirement of the Fifth Amendment cannot be avoided by reliance on a state constitution, statute or court decision; and furthermore the statutes involved in the Horse Heaven case are inapplicable to the Priest Rapids Irrigation District (pp. 45-51, *supra*).

The fallacious character of the Government's argument is further demonstrated by applying the Government's "acquisition policy" in No. 128-99 to the situation of the Horse Heaven Irrigation District.

In 1938 the Horse Heaven Irrigation District (due to foreclosures effected in depression years) owned net assets of approximately $385,000 in value (11 Wn. (2d) 218, 222, 224, 118 P. (2d)

972); and in 1938, although more than twenty years old, that District had not irrigated any of its lands. In view of that latter fact, plus the fact that it had no outstanding bonded indebtedness, it qualified for dissolution and was dissolved under Rem. Rev. Stat. 7527-1, L. '39, ch. 149, p. 447.

If the Government's "acquisition policy" were the law, the Government in 1938 could have taken the Horse Heaven District's properties and all lands within that District; could have proceeded with declarations of taking covering those lands within that District which were owned by others than the District; could have acquired said lands at merely their "dry land" values; could have kept from the juries any evidence as to the value of the Horse Heaven District's properties; and could thereby have become the owner of the District's properties (worth $385,000) which were taken by the Government without payment of any compensation for the District's properties. According to the theory the Government advances in support of its "acquisition policy," the $385,000 value of the Horse Heaven District's properties would have been reflected in the "dry land" values placed on the other lands within that District.

The Fifth Amendment prohibits any such legal legerdemain. The Horse Heaven case could not be used by the Government for the purpose of such legal legerdemain even in a Horse Heaven type of situation. Obviously, that case cannot be used for

such a purpose against the Priest Rapids District which is not within the purview of the state statutes involved in the Horse Heaven case.

E. *Answer to Government Argument I, E*

The Government argues that: "The Government's liability to the landowners would have been the same if the District-held properties had been taken before rather than after the privately owned lands" (App. Br. 20-22). Such argument assumes or implies that, in fact, the Government took the District's properties after the privately owned lands. — However, the Government undertook condemnation of *both* the District's properties and the privately owned lands in one and the same action, No. 128, on February 23, 1943 and April 22, 1943; and on the same dates and in that action the Government obtained orders granting the right of immediate possession to all of the property included in the perimeter descriptions of the areas being condemned (R. 2-32). Pursuant to those orders, the Government in fact took actual possession of the District's irrigation properties on April 1, 1943 and the District's power properties on October 1, 1943 (R. 307). From time to time amended petitions and declarations of taking covering privately owned tracts were filed, as shown by the amended petition No. 128-43, filed on August 26, 1943 (R. 70-80) and by Judge Schwellenbach's memorandum opinion (R. 175-181, at 177).

The Government's argument (App. Br. 20) commences: "In acquiring the privately owned lands *before it sought legal title to the property held by the District,* the United States adopted the method * * *" (Italics added). The italicized clause quoted refers to the amended petition and declaration of taking No. 128-99 filed on May 12, 1944 (R. 106-130) and to the Government's attempt to use the ancillary, declaration of taking procedure as a device for carrying the Government's "acquisition policy" into effect. — Part II of this brief of the District, pp. 30-35, *supra,* shows that attempt to have been unconstitutional and contrary to decisions of the federal courts.

Perhaps it is because of the Government's position and the court's decisions in *Comparet v. United States,* 164 F. (2d) 452, (CCA 10th 1947), and *United States v. Block,* 160 F. (2d) 604, 607, (CCA 9th 1947), that the Government now argues (App. Br. 20-22) that it could have taken the District's properties without a judicial determination of just compensation for those properties, regardless of whether the Government took them before or after it took the privately owned lands within the District. — In view of its position in those cases the Government cannot, without glaring inconsistency, deny that it took the District's properties on February 23, 1943 and April 22, 1943, when by court order it acquired the right of immediate possession, or on April 1, 1943 and October 1, 1943 when it

took actual possession. See also *United States v. Certain Lands,* 46 F. Supp. 800, 802 (D. C., E. D. Iowa 1942); *United States v. Bauman,* 56 F. Supp. 109, 112 (D. C., D. Ore. 1943).

Compensation to the Chicago, Milwaukee, St. Paul & Pacific Railroad Company for its railroad properties covered by the April 22, 1943 petition and order in No. 128 (R. 17-18, 28) could not be less than the guaranteed full equivalent, regardless of whether the lands in its service area, acquired in the same condemnation action No. 128, were actually occupied by the Government or were covered by declarations of taking before or after the railroad property. And vice versa. Likewise as regards any other utility properties. Likewise, as to the District's properties and the privately owned lands within the District, both acquired in the same condemnation action No. 128. See *United States v. 25.4 Acres of Land,* 71 F. Supp. 248, 251; pp. 42-45, *supra.*

II

The Government Cannot Properly Complain of the Court's Judgment Re the District's Irrigation Properties.

The Government, in part II of its brief (App. Br. 22-26) contends that " In any event the judgment upon the award should have been reduced by the amount of estimated just compensation deposited with the declaration of taking."

The Government's argument (App. Br. 23-24) that the $170,500 was deposited by the United States "for or on account" of the $473,356 awarded the District is contrary to the record. In its amended petition No. 128-99 the Government, after alleging that it had become owner of the District's properties subject to the lien of the District's bond debt, alleged that the $170,500 deposited in court with declaration of taking No. 128-99 would be enough, together with the District's own funds, to pay and discharge the District's bonded indebtedness (R. 118). Furthermore, the Secretary of War in his letter of May 4, 1944 frankly stated, regarding the $170,500: "This compensation represents the outstanding indebtedness of the District" (R. 81). He further stated in his letter (R. 82) that he believed the $170,500 he recommended for deposit would be sufficient, together with the District's funds, to pay the District's indebtedness.

The Schwellenbach formula, adopted and applied by Judge Driver, accepted the Government's "acquisition policy" as to the District's irrigation properties but rejected it as to the District's non-irrigation properties.

The jury, in answer to the special interrogatory, determined that the irrigation properties on April 1, 1943 had a value of $365,845 (R. 1132). Those were the properties of the District which the Schwellenbach formula gave to the Government under the Government's "acquisition policy" of tak-

ing the District's properties subject to the lien of the District's bonded indebtedness. That indebtedness, as provided by Washington statute, was a lien on the District's irrigation properties (Rem. Rev. Stat. sec. 7434, L. '21, p. 444, sec. 10).

Whether, in the trials regarding privately owned lands, submission to the juries of evidence of bond assessments and of the bonded indebtedness caused the verdicts to be lower than they would have been otherwise (R. 1135); App. Br. 24-25) does not affect the propriety of Judge Driver's judgment that the $170,500 should be handled in accordance with the Government's "acquisition policy" and in connection with the irrigation properties which the Government received under that "policy" as adopted and applied by the district court. — However, the Government's statement that it "cannot concur in the idea" that such evidence reduced the awards to private landowners (App. Br. 25) is strange enough to be noted. That statement is from the same Government which contends that awards to the private landowners did reflect the value of the District's properties, even though evidence of the value of the District's properties was *not* introduced.

In arguing against the $170,500 being used in accordance with its "acquisition policy" and in accordance with its amended complaint in No. 128-99, the Government states (App. Br. 25) that it might have deposited—"as would have been consistent

with its position—one cent." And from the suppositious deposit of 1¢, the Government spins its argument. There is no explanation of how a 1¢ deposit, instead of its $170,500 deposit, would have been consistent with the Government's position.

The Government states regarding the $170,500 that: "Something has turned out badly" (App. Br. 25). But not badly for the Government. The Government got the District's irrigation properties, which the jury determined to have a value of $365,845, for only $170,500.

CONCLUSION

For the foregoing reasons in support of the District's cross appeal and in answer to the brief of the Government, appellant—it is manifest that upon the District's cross appeal the judgment of the district court should be reversed and the cause remanded with directions to enter a deficiency judgment in the sum of $668,701 together with interest as specified in the District's proposed judgment (R. 1146); and that upon the Government's appeal, the judgment of the district court, in those respects as to which the Government appeals, should be affirmed.

Restpectfully submitted,

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APPENDIX "A"

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 128-100

UNITED STATES OF AMERICA,

Petitioner.

vs.

CLEMENTS P. ALBERTS; RICHLAND IRRIGATION DISTRICT, a corporation of the State of Washington, et al., STATE OF WASHINGTON, et al.,

Defendants.

and

No. 128-99

UNITED STATES OF AMERICA,

Petitioner.

vs.

CLEMENTS P. ALBERTS; PRIEST RAPIDS IRRIGATION DISTRICT, a municipal corporation of the State of Washington, et al.,

Defendants.

MEMORANDUM OF THE COURT

These two Irrigation Districts have set up in their answers allegations which raise the issue as to the right to compensation for the assets owned by the Districts. To each affirmative answer, the petitioner has interposed a demurrer. The demurrer in each case is identical.

The petitioner first contends that the persons signing the answers are no longer qualified so to sign

because the Irrigation Districts have been out of business for three years and held no elections. Assuming arguendo the correctness of petitioner's contenion, this does not mean that the property owners within the District are not entitled to defend this action. It is agreed by the counsel that, under the Washington Statutes and Decisions, an irrigation district holds legal title to the property owned by the District, which title it holds in trust for the owners of land within the District who have a beneficial interest. The situation parallels that presented in State ex-rel Pryor vs. Paul, 5 Wash. 2d 90. In that case, the Horse Heaven Irrigation District had been dissolved through the statutory process. It owned a considerable amount of property. The Supreme Court approved the action of trial court in appointing [143] the directors of the District to proceed as Trustees for the creditors and property holders of the District and account for the property and money to the Court. It is elementary that a trust will not fail for the lack of a trustee so that, even if we assume that the State Statute controlling the distribution of assets upon the dissolution of an irrigation district is deficient, the Court would have not only the right but the duty to appoint a trustee or trustees to represent the beneficiaries or landowners whose property has been taken.

I see no merit in petitioner's second contention that there is a defect of parties defendant. The petitioners selected the parties defendant. This is the first time in my experience that I have heard of a plaintiff complaining that the defendants of its choice were not proper.

The petitioner's third attack upon the affirmative answers is that they fail to state facts sufficient to constitute a defense. I have considered all of the cases cited by counsel on both sides. My failure to discuss them in no way indicates lack of consideration of them. The fact, however, is that we have presented here an anomalous situation in which very little benefit can be derived from other cases. These irrigation districts, on Febraury 23, 1943, owned certain assets. They held such assets in trust for the landowners. On that date, an order for immediate possession of all the property of the Districts and within the Districts was signed. From time to time thereafter, declarations of taking were filed covering various tracts within the Districts. After legal title to all the land in the Districts had been acquired by the petitioner, the property involved here was taken by the Government by filing declarations of taking. It seems to me it would be grossly unfair, if these landowners owned a beneficial interest in the District property, to deprive them of their opportunity for compensation for such property simply because the Government chose to take their land before it took the legal title which the Districts held in trust for the owners of the land. To reach such a conclusion would do violence to my conception of the obligation which the Government owes to its citizens whose property it takes. The Government had the power to control the litigation. The landowner was afforded no choice. For the Government to seek to exercise its power to the [144] substantial disadvantage of the landowner is unjust, inequitable and

improper. I know that a legal argument can be made to the contrary. Such argument can be buttressed by well-considered opinions of the appellate courts. Viewed as a whole, however, it must be admitted that the Government never tried to do this before and that there is no case which covers the situation presented here.

The fact that most of these cases involving the lands themselves have been tried should not prevent the landowners from receiving that to which they are entitled out to the Districts' assets on the theory that a condemnation case can only be tried once and that, in these proceedings, the landowners are attempting to take a second bite at the apple. The fast is that, in the first case which was tried, the landowner attempted to assert his claim to his proportionate share in the District's assets, the petitioner objected and I rule against the landowner. The basis of this ruling was that in the trial for the purpose of determining the compensation to be paid for a separate tract, there was no room to try out also the value of that landowner's proportionate share of the District assets. He was not the owner of the legal title to the District assets. He had no right to assert a direct claim to his proportionate share. Furthermore, as a matter of procedure, if I had permitted each landowner to assert his claim in each separate trial, it would have resulted in chaos and interminable delay as a consequence of which this cases never would have been completed. Imagine the situation in each case of having the voluminous testimony as to the value of District

assets presented to each separate jury. Furthermore, it would have resulted in an absurd situation because the landowner in one case would have a jury fixing one value upon the District's assets and then the jury in the next case might place an entirely different value upon the District's assets. The awkwardness and the confusion which would have resulted was realized by counsel on both sides and dozens of cases have been tried since with the understanding that, at some time, the question of the right of the landowners to their proportionate share of the value of the District assets would be thrashed out.

On the other hand, the landowners are not entitled to compensation for that portion of the District assets which was valuable only for irrigation [145] purposes. In each one of the trials and in all of the appraisals, the value of the separate tracts was based upon the proposition that they were within the irrigation district and had irrigation water available. Verdicts and settlements which have been made in these cases have been substantial. They have been based upon the land valued as irrigated land. For the owner of the lands now to receive compensation for the District assets which were devoted to irrigation purposes would amount to double compensation. Furthermore, the Government has paid out to the holders of the bonds in the Priest Rapids Irrigation District $170,500.00. It has paid out to the holders of the bonds of the Richland Irrigation District $97,000. Clearly it is entitled to offset the amount thus paid out against

any claim for compensation for the District assets.

It seems to me that what must be done in this case is that the Districts set up in their answers their contention as to the value of that portion of the assets in each instance which is not applicable to irrigation purposes and make claim for that amount after giving credit for the sums the petitioner expended in the payment of District obligations. While some difficulty may be encountered in making such allocation, I am sure it is not insuperable. I had personal experience in working out the formula for the allocation as to power and flood control and navigation on the Bonneville Dam. I know that a similar formula was worked out as between power and reclamation on the Grand Coulee Dam. While I do not attempt now to decide the question, I am frank to say, as I look at the answer of the defendant Richland Irrigation District, I do not see how it can be entitled to any compensation. It was exclusively an irrigation district and its assets were exclusively used for irrigation purposes. Any assets listed which were not so used were more than covered by the $97,000 which the petitioner paid. On the other hand, the Priest Rapids District, according to its answer, owned non-irrigation assets valued substantially in excess of the amount of the bond money paid on its behalf.

I will sustain the demurrer to each affirmative defense granting to the defendants, however, the right to file a second amended answer embracing the theory heretofore outlined by me. The prayers in the answers should also include the request that the Court appoint some person or persons as trus-

tees to [146] liquidate the assets of the Districts and account for the money received to the Court for distribution to those entitled to such money.

L. B. SCHWELLENBACH,

United States District Judge.

CC: to B. H. Ramsey, Special Assistant to the Attorney General, 520 Miller Building, Yakima, Washington; and to Messrs. Moulton & Powell, Attorneys at Law, Kennewick, Washington, this 21st day of June, 1945. ECL Dep. Clerk.

Filed June 21, 1945.

APPENDIX "B"

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 128-99, 128-100

UNITED STATES OF AMERICA,
Petitioner,

vs.

CLEMENTS P. ALBERTS, et al.,
Defendants.

TRANSCRIPT OF PROCEEDINGS RE ORAL OPINION UPON CONCLUSION OF ARGUMENTS ON MOTIONS AND DEMURRERS ON 6/1/46.

Be it remembered:

That the matter of argument of counsel upon motions and demurers in the above entitled cases came regularly on before the Hon. Sam M. Driver, Judge of the United States District Court for the

Eastern District of Washington, beginning on Wednesday, May 15, 1946, at Yakima, Washington, and resumed on Friday, May 31, 1946, at Spokane, Washington; Mr. Bernard H. Ramsey, appearing as Attorney for the plaintiff; and Moulton & Powell, Mr. Charles L. Powell, of counsel, together with Mr. J. K. Cheadle, appearing for the defendants herein.

Whereupon, after the conclusion of argument of counsel, the Court made the following decision:

The Court: This matter has been so thoroughly and extensively argued with about five hours of argument here in addition to the argument we have had at Yakima, that the Court will merely adopt one side here and it will not be necessary to take a great deal of time in stating the Court's view.

In the first place, I think the motions directed against the state proceedings which the Court took under advisement at Yakima should be taken up first. The Court has gone quite thoroughly into this matter of the Federal Court enjoining proceedings in the State Court, and it seems to me that a Federal Court should not enjoin State procedings unless it is necessary to protest property that is within the custody of a Federal Court, or to protest proceedings that are an action in rem or quesi in rem. The Federal Statute 28 U. S. C. A. 379 provides that an injunction shall not be issued by the Federal Court to restrain proceedings in State Court except in certain cases arising out of bankruptcy. [220]

There has been a well-defined exception grown up to that statute, another exception other than in bankruptcy proceedings, by judicial decisions, and that is known as the exception in the res cases, and is regarded as a rule of necessity to be sparingly applied. I think that is particularly apparent from the recent case of Tousey vs. New York Life Insurance Co., 314 U. S. 119, in which Associate Justice Frankfurter wrote the opinion and detailed the history of this statute, and defined the exception which can be applied to its policy. He pointed out that it is a very well defined public policy announced by Congress in that statute that there shall be as little conflict and as much comity established as possible, at least as far as Federal Courts are concerned.

The only exception that could apply to that statute is the res exception. That is where an action in rem is brought in Federal Court and the Court will then enjoin any subsequent action or proceedings in State Court which would interfere with the Federal Court's jurisdiction over and control of the res.

This particular case which is before the Court is without question an action in rem. It is an action brought to condemn certain lands and properties of the irrigation districts and the owners of land within the districts. However, it seems to me that the res of this action does not go beyond the particular property which is covered by the condemnation action which is taken under the order of possession and declaration of taking in these cases.

The funds in the possession of the county treasurer, who is ex-officio treasurer of the districts, have not been covered in any way by these condemnation proceedings. They are not covered, as I understand it, by any declaration of taking. It is property that is not part of the res in this Court. That became fairly apparent when the Court asked the question and it could not even be stated what the amount of the funds was that remained on deposit with the county treasurer. And after all we must remember that these irrigation districts are not only corporations of the State of Washington, but they are municipal corporations of the State of Washington, and their officers in a sense are municipal officers of a subdivision of the State of Washington; and it is peculiarly appropriate, it seems to me, that the management of their affairs should be left to the State [221] Court jurisdiction insofar as it may be done without interference with the proceedings in this Court.

I might say this: I think that both sids concede here, or seem to concede at least, that regardless of whether these irrigation districts have been stripped of all of their assets so far as the condemnation case is concerned, other than the bare legal title as has been stated, nevertheless those irrigation districts are legal entities. They have never been extinguished as legal entities, and, certainly, they could not be extinguished because the circumstances have made it impossible to carry on their elections re-elect their directors.

I notice in ruling upon the demurrers of the Government in those state cases the Superior Court Judge for Benton County indicated that he regarded these old directors or holdover directors of these districts as de facto directors of these districts, and indicated that that is what that Court would hold. But, in any event, it seems to me these districts which have been brought into Court through action of the Government would have the right to defend the action of the dissolution; and they should have the right to use funds which are not in this Court as part of the res of these proceedings for the purpose of making that defense. Of course, it will be assumed, and I think should be assumed by this Court, that the Superior Court of Benton County will not properly and will not permit the assets of the corporations which may be under the state court's control to be wrongly used and dissipated improperly, and that that court will not seek to interfere with the res of these proceedings.

For the reasons stated, I do not think further elaboration is necessary. The motions of the Government for appointment of receivers for the irrigation districts and for injunction to restrain prosecution of the actions in the Superior Court of the State of Washington will be denied. As I understand it, there is actually in fact a separate motion for appointment of receiver and for an injunction as to both irrigation districts, there being two cases in Benton County which involve each of these districts.

Mr. Cheadle: Yes, your Honor. Is that not correct, Mr. Ramsey?

Mr. Ramsey: Yes.

The Court: Now, with reference to the demurers to the amended answers [222] which have been just recently argued before the Court here, I think both sides should be complimented for the manner in which these cases have been presented. They certainly have been thoroughly presented and on the Government's side there is a very strong legal basis for the Government's position. It is a matter of cold logic for the Government's position. The Government's position is almost unanswerable, it seems. But we have here a peculiar situation. If there has been a case before where the Government has taken over the entire irrigation system and all of the lands of the system and all of the works and properties of the district in one stroke, as has been effected here, that case has not been called to the Court's attention.

It seems to me that it is unfortunate that this case having been pending here since February, 1943, over three years, that this basic question, which is a very difficult and trying and unique question, has not been decided by the Circuit Court of Appeals. I am not attempting to place the blame, certainly, but it would surely lighten the burden of this Court and the task of the litigants because it is a very difficult and unique situation that is presented here to me that has grown out of this peculiar situation.

I think that this litigation should be regarded as a whole or, I should say, interrelated as to each irrigation district.

The Government secured its order of possession in February, 1943. I don't think that the Government thereby took possession or that title passed or that that measured the time when the landowners were entitled to the compensation as of the value taking date; but it certainly did indicate very clearly the intention of the United States to condemn all of the lands and facilities of each of these districts and put in motion the machinery by which that was to be done. And regarding this litigation, the condemnation of each district as at least interrelated and a unit in a sense, my predecessor, Judge Schwellenbach, has already carried on or concluded many of the separate trials involving many of these original landowners, all of them except those that have conveyed by deed. In doing that, his memo as indicated by his ruling upon the amended answers clearly indicates that he adopted a certain theory and line of policy and it was tried in the cases involving the original theory and line of policy and it was tried in the cases involving the original owners.

As I read his memo, his conclusion was that the owners of the district, while, of course, the Government is taking only the fee title which includes everything that goes with the lands, that they were in a sense in a duel position, that they owned irrigated land with the water rights appurtenant thereto for which they were entitled to compensation; and that also in a sense as owners of land in the district they were in the position of stockholders in the district, that is, they were entitled to com-

pensation in their proportionate share of the assets of the district. The assets of the district which enter into and are necessary to the supplying of the water to the land, they are what Judge Schwellenbach referred to, I believe, as the irrigation assets or assets adapted to and used for the supplying of water for the lands. They, I assume, Judge Schwellenbach considered entered into and became a part of the value of the land and the Government compensated the owner for that when they paid him the fair market value of the land as determined by the jury.

Judge Schwellenbach also took it, I assume, that as to the assets of the district which were not used exclusively for irrigation, that they did not enter into the value of the land as determined by the jury, that the owner was entitled to his pro rata share as to the value of those properties not used for irrigation.

As a matter of policy and for convenience, if for nothing else, Judge Schwellenbach decided, and I think properly so, that it was not the proper thing to do to try out in each individual case the proportionate value to which each landowner would be entitled. That would involve, as he pointed out, having the assets determined over and over again by the jury in successive individual cases; and, of course, they would in all probability find difference values in different cases. But, as he pointed out in ruling upon the demurrers to the original answers, he felt that while the landowners were not entitled to receive compensation again for the assets of the districts used for irrigation, as that would be in

effect giving them double compensation, he thought that in all fairness they should have their pro rata share of the non-irrigable assets of the districts.

I suppose I am not bound by what my predecessor has done here but, it seems to me that in all fairness, that since this litigation is so far advanced, at least under this situation it is the fair and proper and equitable thing for me [224] to do to adopt and attempt to apply the formula of my predecessor since he has already acted upon it in these individual cases. I don't think it is fair to change the theory or change the method in the middle of this litigation, considering it as a whole. I can see that it will involve grave difficulties and will not be an easy thing to work out but that is a matter and a bridge that will have to be crossed when we reach it, I suppose.

I think if we may apply the formula—if we may call it that—of Judge Schwellenbach, that the demurrers should be overruled.

It is true that in the Richland case there is only a limited amount of property sold there that is not devoted to irrigation purposes and that it does not exceed the amount of the bond issue. But I think also that applying Judge Schwellenbach's formula even in that case the value of the non-irrigable assets of the district should be passed upon and determined by a jury, and then, if that is determined to be the proper thing to do—I am not passing upon that question definitely now—but if it is determined by this Court to be the thing to do, if they amount

to less than the bond issue and can be applied to the payment of the amount advanced by the Government to buy the bonds, it seems to me that at some stage of these proceedings that if the assets are not sufficient to pay what the Government has advanced, to pay off these bonds, that it should be determined definitely how much has been retired by application of the assets here and how much of an excess that the Government is entitled to that it might have a right to recover or which might be a lien upon other assets not involved in this proceeding.

Now, I think I indicated in the ruling on the motions for injunction and appointment of receiver that it is my view that these irrigation districts as defendants in these actions should be represented by those officers whom the state court decides are entitled to represent them; that the matter of liquidation of an irrigation district is primarily a matter for the State Court, and while I appreciate the fact that in a condemnation proceeding not only must the value of the property taken be determined but also the persons who are entitled to receive it, nevertheless, it seems to me, that in this situation the person entitled to receive the compensation is the irrigation district, a legal entity. And if I should attempt to determine who is entitled upon liquidation of that corporation [225] to its assets, I would be simply dissolving an irrigation district in Federal Court, which is not altogether necessary in a condemnation case or a part of it, as I view it. Certainly, if the Government took over the assets of a private corporation, we would not undertake

to pay the award to the stockholders. It would be paid to the corporation even though all of the property of the corporation might be taken in the motion, and it would be the duty then of the corporation to determine who is entitled to its assets; and I think that is the situation here. And, however, while it may not be necessary to say this, I am inclined to the view at this time that while the state court should determine who is entitled to the non-irrigation assets, that the Government should determine whatever award should be made for the payment of the bond issues. And I think also that the funds should be impounded in this court rather than to be paid directly to the directors of the districts or whoever is representing the districts, before the adjudication is made as to who is entitled to receive the funds.

Now, I have stated the Court's view on that for the reason that it seems to me, although I will be willing to hear from counsel for the defendants here if you care to be very brief, that in my view of the situation it would serve no useful purpose to permit individual landowners to intervene because under my theory of it they are represented by the irrigation districts.

Mr. Powell: That is right.

The Court: They have no legal title to the irrigation district property, and only in case that the districts are not legally and adequately represented or they are not properly represented should they intervene. But it would seem that with the adequate representation in these cases that the landowners

are not entitled to intervene, and upon that reason the Court will deny the motion to intervene. I will hear from you.

Mr. Cheadle: In view of the previous ruling of the Court, we do not wish to be heard upon your denial of the motion for leave to intervene.

The Court: I am going to Yakima tomorrow and will be there until about Thursday of next week. If the orders on my various rulings here have not been worked out by that time, I will be back in Yakima, Monday, June the 17th. I have a public utility condemnation case that is starting the 18th but I will be there by the 17th and from then on for probably two or three weeks, so that I would be available for presentation of these orders during those times.

Filed June 4, 1946. [226]

APPENDIX "C"

[Title of District Court and Cause.]

ORAL OPINION OF COURT, 3/7/47

Be it remembered, that the above entitled cause came on before the Honorable Sam M. Driver, Judge of the above entitled Court, at Yakima, Washington, on March 7, 1947, for entry of judgment upon the verdict of the jury; the petitioner United States of America being represented by Bernard H. Ramsey, Special Assistant to the Attorney General, and the defendant Priest Rapids Irrigation District being represented by Charles L. Powell and J. K. Cheadle, its attorneys; whereupon, the following proceedings were had:

(Argument by Mr. Powell and Mr. Ramsey.)

The Court: I might indicate what the Court's view is. It seems to me that we have to solve these problems presented here today in the light of the

situation as it exists, and not what might be the situation if this district were in liquidation in this Court, or if the bondholders were coming in for payment of past due obligations.

The Court has endeavored to apply a formula here that would be equitable and fair to both parties in this very unique and unusual situation that is presented. It is one that was conceived by my predecessor, but I have no disposition to try to avoid responsibility, because it seems to me in a very difficult situation it is just about the most equitable thing that could be done. In this situation we have endeavored to segregate the assets of the District not devoted to irrigation purposes from those devoted to irrigation purposes.

Under the judgment which the Court has accepted here, or the view that the Court has taken of the judgment to be entered, the District is to be compensated directly only for a portion of its property, the portion of its property not devoted to irrigation uses. Ordinarily, of course, in a condemnation case the property owner is compensated for the full cash market value of the property. The theory on which this land-owner is compensated for only a portion of the property is that the government has already in effect paid the equivalent of the value of the irrigation assets of the District in its payment to the individual land-owners within the District. The land is purchased as irrigated lands with the water right attached, that is, with the water right or the duty of water to which the land was entitled by reason of being included in the irrigation district.

It seems to me that under that theory, regardless of what might be true in other situations, that the equitable thing to do is give the District credit for the bond payment out of the value which the jury has found in the special intetrrogatory for those irrigation properties. It seems to me that in this situation, while it may be said that the government has paid for the value of the irrigation assets of the District in paying the individual land-owners, it has paid them less what might be the bonded indebtedness outstanding against the District at the time the individual tract was purchased or condemned. In other words, I assume and I think the record shows that in these individual land cases the amount of the assessment for bond retirement was shown and the amount of the bonded indebtedness of the District, and obviously a water right of an individual land-owner would be lessened in value directly to the extent of the outstanding bonded indebtedness of the District which served him his water. If it would take $10.00 an acre to pay off the bonded indebtedness of the District, it seems to me that would lessen the value of the water right and the value of the land with the water right attached to that extent; so it seems to me under the theory which the Court has endeavored to apply throughout this case that the equitable thing is to provide that the value found for the irrigation properties be applied to the payment of money advanced or paid into the registry of the Court and used for the retirement of bonds to the extent it

may be necessary, in view of the fact that the value of the irrigation assets found is greatly in excess of the amount of the bonds.

As to the second question raised here, I think that was decided in the proceedings brought in this court to determine whether or not the action in the State Court should be enjoined. While it is of course the duty of this Court to determine in a condemnation case with the aid of a jury if one is not waived not only what compensation shall be made to the owner of the property taken, but also to determine the persons entitled to take the compensation, here the Court takes the view that the Priest Rapids Irrigation District, although deprived of all its property, is still a legal entity, a municipal corporation under the laws of the State of Washington, and all this Court needs to determine is that the compensation should be paid to the District as a legal entity. The District being a municipal corporation of the State, under the statutes of the State the proper place for liquidation is in the State Courts, and that action already having been started, I think it is proper to provide that the funds ultimately be paid into the State Court in which the District is being liquidated.

I have no doubt that this case will be appealed, and these questions that I'm deciding now won't be difficult for an appellate court to decide, because they are simply questions of law which that Court can decide as well as I can. I hope all the questions will be decided by the appellate court so we won't be left to guess what should be done about this case and the companions case.